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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. .....

FRANKLYN D. WEBSTER,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Your Petitioner, Franklyn D. Webster, respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner prays that a Writ of Certiorari issue to review the Judgment and Order of the Supreme Court of Ohio, made final on February 6th, 1952 by order overruling his Motion to vacate same,—dismissing his Appeal as of Right, from the Judgment of Affirmance of the Court of Appeals of the Eighth Judicial District of Ohio, affirming the Judgment of "Guilty of the Unlawful Practice of Medicine,"—entered against Petitioner, as Defendant, on October 3, 1950, by the Municipal Court of the City of Cleveland, Ohio.

The record shows the following

FACTS.

Petitioner was arrested on July 10, 1950, on a warrant issued on an Affidavit by a Lawrence A. Dietrich, acting for the Ohio State Medical Board, and as its Inspector, charging the Unlawful Practice of Medicine in violation of Sec. 1286 and Sec. 12694, of Ohio General Code.

(1) Petitioner, as Defendant, pleaded timely, appropriate objections to said Affidavit and the proceedings based thereon as charging no crime and as violative of his Constitutional Rights to Due Process of Law and the Equal Protection of the Law, and otherwise—which were overruled.

(2) He interposed a Demurrer to the Affidavit, for failure to plead the essentially required specific intent as violative of his right to Due Process of Law—and to the Equal Protection of the Law—under both State and Federal Constitutions as appears of record.

At the trial, the State adduced evidence establishing the fact, as alleged in the Affidavit, that the Petitioner *was a duly authorized, certificated Practitioner of Chiropractic and Mechano-Therapy, in Ohio* under Sec. 1274-1 to 1274-7 O. G. C.—inclusive of *40 years standing.* (R. 37, 40, 41, Certificate #367.) That he maintained an office at 5005 Euclid Avenue, on April 6th, 1950.

That on that date, one, Mrs. Carl Kaufman, presented herself for professional examination by Petitioner,—accompanied by one Cole, an Investigator of the Better Business Bureau, and who, falsely representing himself as the husband of Mrs. Kaufman and concealing his real identity, requested Petitioner to repeat the professional examination accorded Mrs. Kaufman, theretofore, to wit, on March 30, 1950,—when she came to Petitioner for professional examination, only, not seeking, nor asking,—nor

receiving any curative relief for her arthritic spine, an affliction of over 18 years duration. Petitioner acceded to said request and repeated the examination,—*solely for the benefit of said Cole,—and for no other purpose.* (Record 40, 41, 49, 52, 55, 56, 57, 74, 85.) A certain diagnostic machine, a part of Petitioner's office equipment, was used in said examination, the better to enable Petitioner to accurately diagnose the physical condition of the body of the Mrs. K. (R. 48, 49, 50, 74, 75, 76, 89, 111.)

Said machine under the control, and manipulation of Petitioner, contacting the body of Mrs. Kaufman, indicated to him the existence of certain pathological and abnormal conditions in her body, and further indicated that in the experience of Seroyal Brands Inc., certain non-drug preparations manufactured and sold by them at Orinda, California, and identified only by their respective trade names and numbers,—would be helpful, if and when the said Mrs. Kaufman did submit herself to Chiropractic and Mechano-Therapist treatment. As a part of said examinations, certain sealed bottles, containing the said several Seroyal Brands, Inc., products,—marked and identified as certain exhibits at the Trial,—were delivered to the said Cole. (R. 89, 90, 102, 103, 104.) He, masquerading as Mr. Kaufman,—the better to conceal his identity and purpose, and in an attempt to secure evidence of the missing, but essential element of Compensation, required by the Statute to constitute the crime, later to be charged against Petitioner,—asked concerning payment for the said several articles, so delivered to him as aforesaid. He was told by Petitioner that he need not pay for them *at that time,* but only if and when Mrs. Kaufman was ready to, and *had actually entered upon Chiropractic and Mechano-Therapist treatments.* (R. 103.) This, she never did, and this, neither Mr. Cole nor Mrs. Kaufman intended to do, at any

time,—which fact they fraudulently concealed from the Petitioner. (59, 60, 75, 76, 82, 84, 89, 90.)

The contents of said bottles never reached Mrs. Kaufman, never were known to her, *never were intended to be used by her medicinally nor for any curative purposes.* (R. 68, 69.) Said bottles, *with seals unbroken,* were taken by her from the hands of the Petitioner and immediately given to said Cole, *not for any curative purposes, nor for any medicinal purposes, but only for the purpose of his special investigation, for the Better Business Bureau,* by which he was employed. (R. 52, 53, 58, 76, 77, 78, 79, 80, 81.) The contents of said bottles never reached Mr. Cole. (R. 76, 77, 78, 79, 80, 81.) He marked said bottles when delivered to him with his own individual, identifying mark, and passed all of the same, *with the seals still unbroken,* to the City chemist, Kunde, for the purpose of examination by the latter.

Kunde broke the seals. He made no examination of the contents thereof to determine their therapeutic quality nor their chemical composition (R. 68, 69), but examined them solely to learn the physical correctness of the said California manufacturer's label, as to content, and whether said labels were true. (R. 62, 67, 71, 72, 87.)

No examination was made to ascertain,—no allegations were made in the Affidavit to sustain—and no evidence was offered to show the innate, essential chemical composition or nature of said contents, nor of any said bottles, nor to ascertain the therapeutic quality of the same. (R. 63, 70, 71, 72, 73.)

No evidence was offered definitive of "drug," *nor that any of said articles were drugs.*

No evidence was offered tending to show any therapeutic or drug nature, or quality or potency of the said

bottles themselves, nor of the said contents of the said bottles.

Kunde had no training permitting, and was not equipped to make any such investigation. (R. 63.)

No evidence was offered tending in any degree to show that the Petitioner intended any therapeutic, curative or medicinal use of said bottles nor their contents nor of said pills, powders, or fluids,—charged.

Petitioner alone testified as to the intention and purpose for which said several articles could be used or were to be used. *He testified that they had a nutritional value, that they were not prescribed as a medicine nor as a drug, but as food.* He testified *that he did not prescribe, recommend or dispense the* said articles shown in evidence as a cure or for the relief of any bodily disease or infirmity of Mrs. Kaufman. Said statements stand in the record *uncontradicted.* (R. 82, 83, 89, 102, 104, 105, 109, 110.) Mrs. Kaufman, the star witness and alleged patient,—corroborated him. (R. 52, 53, 59.) The Court erroneously denied further corroboration of this fact. (R. 128, 130.)

II.

JURISDICTIONAL STATEMENT.

Jurisdiction herein is invoked under 28 U. S. C. Sec. 1257 (-3) and the authorities thereunder.

The conviction complained of is based on a construction of the Criminal Statutes involved, namely Sec. 1286 O. G. C. and 12694 O. G. C., which renders them repugnant, on the record and the evidence, to Art. XIV—Sec. 1 and Amendment V and Amendment VI, of the Federal Constitution,—

(A) In denying to Petitioner procedural Due Process of Law, in his trial and conviction.

(B) In denying to Petitioner the Equal Protection of the Law.

(C) In convicting Defendant of crime while denying him a written copy of the charge, stating the nature and cause of the offense charged, prior to Trial.

(D) In charging Petitioner with an Administrative Offense under Ohio Laws, but convicting him in a Court of Law of a crime, violative of his privileges and immunities as a citizen of the United States, residing in the State of Ohio, under the Federal Constitution.

(E) In convicting Petitioner without charging any crime—contravening his Constitutional privileges and immunities. *Supra*—

III.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

Petitioner says as reasons for the Allowance of the Writ in this case, that—

(1) The decision of the Supreme Court of Ohio here complained of dismissed Petitioner's Appeal as of Right, on the Alleged ground that "no debatable Constitutional Question was involved."

This was a decision on the merits of Petitioner's Appeal as of Right, involving a Federal Constitutional Question,—284 U. S. 230, *in limine*, and while denying Petitioner's Right to be heard on the merits of his said Appeal. Condemned by said Court without a hearing.

(2) His Appeal as of Right in a criminal case, where the charge of crime was colorable only, the affidavit charging no crime, but an *Administrative Offense*, only, and being irregularly and illegally used as a vehicle of attack on Petitioner's good name and standing as a citizen and his

reputation in his profession, his attempt to secure a review to regain his liberty and vindicate his good name and standing was dismissed summarily, as "*frivolous*"—Taft C. J. in *Matthews vs. Huwe*, 269 U. S. 265—in effect, affirms said Court of Appeals Judgment and is repugnant to Petitioner's Constitutional Rights under A and B of Section II—*supra*, and remedial here by Certiorari.

(3) The prosecutor in the Affidavit, presumed to construe the meaning, scope and effect of Defendant-Appellant's Certificate of Practice #367. In this he exceeded his authority, as did the Court in acting upon it. It in effect nullified, suspended and revoked that license, which for administrative purposes is said to be conclusive of the right of the holder to practice medicine in this state,—Section 1274 O. G. C.

An Administrative Offense, Only, Charged.

This was an administrative act, disciplinary action to punish which was delegated to the State Medical Board, and withheld from any Court, as a primary proceeding. This irregularity rendered the conviction void for lack of jurisdiction.

For it has been held,—

> "The revocation of a certificate granted a Physician and Surgeon is as much an administrative function as is the original grant of a certificate, *and under constitutional provisions for the division of powers between branches of the Government, authority cannot be vested in a Court to determine, upon its independent judgment, whether a certificate should be revoked.*"
>
> *Jaffe vs. State Department of Health*, 64 Atl. (2nd) 330.

In this case the Court did by indirection what it could not do directly because of the question of administrative law involved and sought to circumvent its own laws.

And it is the law that,

"Courts cannot or will not determine a controversy involving a question which is within the jurisdiction of an administrative tribunal where the question demands the exercise of sound administrative discretion, requiring the special knowledge, experience and service of the administrative body to determine technical and intricate matters of fact, and a uniformity of ruling is essential to comply with the purposes of the regulatory statute administered. The principle is derived from a consideration of the nature of the inquiry and the action required for its solution."

Public Administrative Law, 42 *Am. Jur.* Sec. 254, p. 698.

"When it appeared in the course of the litigation that an administrative problem committed to the Commission (Interstate Commerce Commission) was involved, the Court should have stayed its hand pending the Commission's determination of lawfulness and reasonableness of the practices under the terms of the Act."

Tank Car Corp. v. Terminal Company, 308 U. S. 433.

"Although a statute may give an apparently clear right to sue, the Courts in the interest of uniformity have declined to accept the decision of questions involving functions essentially belonging to the Interstate Commerce Commission."

Railway Company v. Brownsville, 80 Fed. 2nd 100, 304 U. S. 296.

"Where a function committed to the Interstate Commerce Commission involved the exercise of adminis-

trative judgment, *no justiciable question or* *ordinarily* *arises until the Commission has acted."*

Texas & P. Railroad Co., v. Gulf C. & F. R. *Railroad* *Co.*, 270 U. S. 266.

(4) Aside from objections in II—A-B-C, Pe Petitioner insists the conviction and affirmance complained ed of sus- tains as valid, a Judicial prosecution for an Admini nistrative Offense, without requiring the Special Judicatory p provided by the Administrative Statute, The Ohio State e Medical Board, first to try and decide the matter under r its own procedure.

The Trial Court thus had no Jurisdiction and d no right to proceed and acted before any Juridical Question n or Issue was presented. This rendered its Judgment of co onviction void.

Windsor v. McVeigh, 93 U. S. 274.

Affirmance of the Void Judgment on Revie w left it still invalid.

1 *Freeman on Judgments*, 322, p. 344 (5 Ed.)

IV.

QUESTIONS PRESENTED ARE:

Does the state of Ohio by this action complained o of offend against the petitioner by,

(1) Depriving him of his right to Due Pr rocess of Law in the Conduct of said Trial.

(2) Deprive him of the Equal Protectio n of the Law in the result achieved.

(3) Deprive him of Rights, Privileges a and Immunities as guaranteed him within the pur rview of Art. XIV—Sec. 1 and Amendments V and VI of the Federal Constitution and may he have remedy by Certiorari as provided in 28 U. S.—Sec. 1257-3 a nd Rule 38-5 of this Court.

WHEREFORE, Your Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the said Supreme Court of Ohio, commanding that court to certify and to send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in said case No. 32743 on its docket, and entitled, *State of Ohio, Plaintiff-Appellee vs. Franklyn D. Webster, Defendant-Appellant,* and that said judgment of said Supreme Court of Ohio, may be reversed by this Honorable Court, and that your Petitioner may have all such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

FRANKLYN D. WEBSTER,

By ALEXANDER H. MARTIN,

Counsel for Petitioner.

BRIEF OF PETITIONER.

We refer to our Summary Statement in No. I of the Petition, and by reference, make same the Fact Basis of this Brief, the same as if here repeated.

ARGUMENT.

In Ohio all crimes are statutory. It is enacted that,—

> "whoever practices medicine or surgery or any of its branches before obtaining a Certificate from the State Medical Board in the manner required by Law,—"

commits a crime.

12694 O. G. C.

Although Franklyn D. Webster, as a *Limited Practitioner of Medicine,* was not governed by this Statute in the Practice under his Certificate #367, authorizing the practice of Chiropractic and a Mechano-Therapist in Ohio, until said certificate had been duly suspended or revoked, he was limited by his Certificate and the Statutes in the use of drugs, in that he could not prescribe or adminster drugs.

1274-3 O. G. C.

Penal statutes must be strictly construed in Ohio—

12 *Oh. Jur.* 53, Sec. 12;

State vs. Winterich, 157 O. S. 414.

And in Ohio,—

> "A Statute defining a crime or offense cannot be extended, by construction to persons or things not within its descriptive terms though they appear to be within the reason and spirit of Statute."

State vs. Meyers, 56 O. S. 340;

State vs. Winterich, 157 O. S. 414.

I.

AFFIDAVIT IS FATALLY DEFECTIVE.

The Affidavit in this case omitted to charge,—

That the alleged drug was for the relief of any dise or physical disability of the alleged patient, Mrs. Kaufm In so doing, it omitted the specific intent made a part of t crime under the Statute under which proceedings w brought.

Moreover, "the affidavit in express terms stated t the Defendant was the possessor of a certain Certificate practice Chiropractic and Mechano-Therapy." Thus moving him by said affirmative statement from crimi liability.

State vs. Winterich, 157 O. S. 414.

(A) Under the Authorities, the Law says, moreo

"That an indictment in order to be sufficient must av with reasonable certainty all the material facts nec sary to a conviction. Nothing is to be left to inter ment which is necessary to prove, in order to make a crime."

Knight vs. State, 54 O. S. 375.

Besides, Sec. 13439-9 O. G. C. expressly states the fidavit is insufficient and demurrable when it omits su allegation as that above referred to.

(B) Affidavit defective because fatally indefinite.

Moreover, the Affidavit is fatally defective because t fails to inform the defendant of the nature and cause of t accusation against him, with that definiteness required y law, sufficiently to inform him of what he must meet at t trial. It fails to charge, against the defendant, the ov act described in the statute, and which the state must pro in order to secure a conviction. The drugs charged are,

"pills," "powders" and "fluids."—No drugs at all—

> Then the affidavit enumerates certain articles manufactured by the Seroyal Brands, Inc., of Orinda, California, and sold and distributed in the original packages by the manufacturer,—by their several trade names. Names not known to the U. S. Pharmacopoeia, nor to Science, nor to Art, nor in common Parlance.

A mere reading of the alleged charge discloses this defect too plain for argument and shows the Error in denying the Bill of Particulars.

Of the many cases which show that his defect is fatal, we mention the *Groenland* case, where,

> "The defendant was charged with the sale of a drug in violation of the Food and Drug Act, because the article sold was not of the standard strength, as laid down in the U. S. Pharmacopoeia,—without stating how said drug differed. He was convicted. But the reviewing Court said, reversing same.
>
> "Said Affidavit is insufficient and is in violation of the Bill of Rights, Section 10, Article I of the Constitution, which accords the Defendant the right to know before the trial the nature of the accusation against him.
>
> "Every one charged with a crime is presumed innocent until proven guilty, and an innocent man could not know the nature of such a charge or which of the several possible charges he would have to meet. Besides as a sample was procured by the prosecutor, it is known to a certainty from the analysis wherein the difference lies. It is upon the sample sold that the charge is founded. It is an unfair advantage taken of the defendant and contravenes his constitutional rights not to charge him in the statement with such definiteness of fact, as is plainly within the knowledge of the prosecution and is not within the knowledge of the defendant, as an innocent man."

So in our case these articles charged against the Petitioner in their innate and essential nature were known to the state, and must have been known before it preferred the charge upon them as a basis. It withheld and withholds from the innocent Petitioner any mention of, and all information as to what they are, and covers up under the description of "pills," "powders" and "fluids," with a long string of designedly meaningless trade names, designed by the manufacturer to conceal, rather than to disclose the real nature of the articles to which they are, by said manufacturer, applied.

Groenland v. State, 4 N. P. 122, citing as the source of said doctrine,
Dillingham v. State, 5 O. S. 280;
Fout v. State, 8 O. S. 814;
Lane v. State, 39 O. S. 313.

The Court erroneously overruled the Demurrer, and the Special Plea in Bar, and Objection to the Introduction of any Evidence and overruled the Petitioner's Motion for a Bill of Particulars, all challenging the Court's attention to this defect, in charging the crime with the required definiteness. Violative of Sec. 10, Art. I of the Ohio Constitution, and Amendment VI of the Federal Constitution.

(C) The record discloses therefore that there was no drug actually charged. It is certain that "pills, powders and fluids," failed to describe any drug. The record fails to disclose—that there was any drug by name, according to any accepted list of drugs mentioned or described in the affidavit.

II.

CLEAR FAILURE OF PROOF.

Not only was there no specific intent charged, and no drug charged, but the intent necessary to constitute the crime was not shown in the evidence.

No one testified that a drug as such was used.

There is no evidence that the articles shown in evidence were used, or intended to be used as drugs. The Petitioner *testified that they were Foods.* (R. pp. 105, 108, 109, 110, 125.)

He testified that he intended them to be supplements, to the other food intake of Mrs. Kaufman, in order to ready her for *future treatment,* and that *he intended them for no other purposes.* (R. 101, 110.) His statement to that effect is uncontradicted. "Guilty," thus violates a rule of evidence set forth in *Hayes vs. Bank,* 125 O. S. 359, to the effect that the Trial Court has no right to find contrary to the uncontradicted statements of the Defendant on the material points of his case.

To Charge and Try an Administrative Offense as a Crime Flouts Due Process of Law.

But if the Affidavit were sufficient to charge a crime, which we insist is not the case; and if the crime charged were sufficiently proved in the evidence, which is clearly not the case; and if the error in overruling the Motion to Arrest Judgment,—all did not offend against procedural Due Process of Law, and Equal Protection of the Law. Still we insist that the proceedings are illegal, insufficient, insupportable because the State acted before any justiciable offense had been shown, in that it charged an administrative offense, only, as to which charge, proceedings regularly of necessity had to be brought before the Board it-

self, as the Judicatory provided for such proceedings by the Statute, *before the Courts* of the State could take any Jurisdiction.

III.

PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAW.

Petitioner's Appeal as of Right was summarily dismissed as against him as of February 6, 1952, the entry being,—

> "On consideration whereof it is ordered and adjudged that said appeal be and the same hereby is dismissed for the reason *no debatable Constitutional Question is involved.*"

The Ohio Constitution in Art. IV, Sec. 6, provides,—

> "The Decisions in all cases in the Supreme Court shall be reported, together with the reasons therefor."

Petitioner had and has a right to invoke the Appellate Jurisdiction of his Supreme Court for the protection of his rights, his property, his liberty from unwarranted attack from any source in any case involving questions arising under the Constitution of the United States or of the State of Ohio.

For by Sec. 2, Art. IV of the State Constitution as follows—

> "The Appellate Jurisdiction in all cases involving questions arising under the Constitution of the United States or of this State."

is the measure of the Appellate Jurisdiction of the Supreme Court of Ohio.

It is further provided in said State Constitution,

> "All Courts shall be open and all persons for an injury done him in his land, property, person or reputa-

tion shall have remedy by Due Course of Law and have Justice administered without denial or delay."

Art. I, Sec. 16, Constitution of Ohio.

The Supreme Court of Ohio, in a former day, declared as a matter of Law, which now is binding upon us all as an irrevocable heritage and right, under said Constitution, that,—

"The right to resort to a Court of Superior Jurisdiction for the reversal of the Judgment of a Lower Court is a Cause of Proceedings,—an indisputable right."

Insurance Co. v. Meyers, 59 O. S. 332.

Remembering that the authorities following are pertinent,—

"A man's profession is his property"—

O'Harra vs. Stack, 90 Penn. 477.

and

"When the question is reduced to a mere matter of Dollars and Cents, the Purity and Integrity and the Uprightness of a professional man's life are his capital in this world's business—"

Hayner vs. Cowden, 27 O. S. 296.

"A man's reputation is the immediate jewel of his soul, —the better part of himself. All else is trash."

Shakespeare.

And remembering the Chief Justice Taft's characterization of a Dismissal of the Appeal here complained of as one, not because of lack of Jurisdiction, but because the Court considered the Constitutional Question involved too frivolous to be heard, and considering that Petitioner's property rights, his reputation, his standing in his profession and his liberty were at stake,—and his background of over 40 years with no breath of accusation against him,

at any time,—it is clear that as a matter of Law and Fact, the Honorable Supreme Court of Ohio went far afield in error, in the matter of said Dismissal, and Petitioner is entitled to the relief here requested.

For this Court speaking through the late, learned William H. Taft, *C.J.*, on the Question of the real significance and meaning of the phrase, "no debatable Constitutional Question is involved," said—

> "The petition was dismissed not because the Court was really without Jurisdiction, *for it could have taken it,* but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character, one which the Court could consider."
>
> *Matthews v. Huwe,* 269 U. S. 265.

On February 6, 1952, the Supreme Court of Ohio, in the Judgment of which we complain held on this record that our contentions were *frivolous,* not, that it was without Jurisdiction to hear our Appeal, and that it had no duty therefore and no obligation under our Republican Form of Government, our Constitution, our Laws, and their position as our Supreme Court, thereunder, to grant some relief on our Appeal as of Right,—*after hearing us on its merits.*

Because, on May 5, 1952, the same Court having admitted a similar case, growing out of the same crusade against limited practitioners, staged in Cleveland, in 1950, by the Ohio State Medical Board and the Better Business Bureau and a part of the Press, admitted the case of *State of Ohio v. Winterich,* where the same issues were made and the same questions presented, nothing more of a Constitutional nature and perhaps something less than is presented in the instant case, heard, and considered and reversed same in 157 Ohio State 414 and ordered the

Defendant discharged, and adjudicated that the case was within the purview of the Appellate Jurisdiction of said Supreme Court, not only, but in said reversal, decided, in effect,

(1) That the intent with which an alleged drug was used, was *controlling*.

(2) That every element entering into the description of the crime of the Unlawful Practice of Medicine as defined by the Statute in said cases (including this case), was essential—and had to be charged and sustained by probative evidence of guilt, in order to a conviction.

(3) That a conviction of an alleged criminal offense cannot be predicated on general principles or mere suspicion but must be predicated on probative evidence of every material element which is necessary to constitute the crime.

Surely the Law must be the same in February and May.

Moreover, a concurring Judge (Taft) justifies our contention here made, "that an In Force Certificate from the Ohio State Medical Board protects a Mechano-therapist and chiropractor from prosecution such as is here attempted, unless and until said Certificate is duly suspended or revoked.

Here the State itself charged in the affidavit and proved in the trial that the Petitioner was a Certificated Mechano-Therapist and Chiropractor of forty years standing. It was not denied that the articles charged were foods, manufactured at Orinda, California, and there purchased from the Manufacturer and transported to Cleveland, Ohio, and there sold to Mrs. Kaufman for use preparatory to chiropractic and mechano-therapist treatment.

This act in the practice of Petitioner's trade and practice was found to be a crime though not charged in the

affidavit, and though no action of the Medical Board thereon against Petitioner was attempted, prior to the prosecution.

This surely presents the question of and surely constitutes an abridgement of Petitioner's privileges of engaging in his business and trade through which he has earned a livelihood for forty years and constitutes an inexcusable and indefensible restraining and fettering of legitimate interstate trade and commerce.

Because of the plain violation of Petitioner's Federally Guaranteed, Constitutional rights, privileges and immunities shown on the above and foregoing record and facts, he respectfully requests this Court to so declare and to reverse the said Judgment of the Supreme Court of Ohio and to remedy and relieve Petitioner against the hurtful operation of the same by its appropriate Writ of Certiorari as prayed for.

Respectfully submitted,

ALEXANDER H. MARTIN,

Attorney for Petitioner.

APPENDIX A.

Copy of Platt-Ellis Law.

(HOUSE BILL No. 220.)

AN ACT

To supplement section 1274 of the General Code by the enactment of sections 1274-1 to 1274-7, both inclusive, for the purpose of regulating further the practice of medicine and surgery in this state by authorizing the examination and registration of practitioners of limited branches thereof.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That section 1274 of the General Code be supplemented by sections to be known and designated as sections 1274-1 to section 1274-7, both inclusive, as follows:

SECTION 1274-1. The state medical board shall also examine and register persons desiring to practice any limited branch or branches of medicine or surgery, and shall establish rules and regulations governing such limited practice. Such limited branches of medicine or surgery shall include chiropractic, naprapathy, spondylotherapy, mechanotherapy, neuropathy, electro-therapy, hydrotherapy, suggestive-therapy, psychotherapy, magnetic healing, chiropody, Swedish movements, massage, and other branches of medicine or surgery as the same are defined in Section 1286 of the General Code that now or hereafter exist, except midwifery and osteopathy.

SECTION 1274-2. For the purpose of establishing the practice of such limited branches the state medical board shall call to its aid the designated persons as provided in Section 1274-3 of the General Code, and such designated

persons shall examine any person who has practiced any such branch in Ohio for a period of at least one year prior to June first 1915, and who makes application prior to October first, 1915, on a form prescribed by the board, in those subjects only which are appropriate to the limited branch of medicine or surgery, for a certificate to practice which his application is made. No such applicant shall be required to comply with the preliminary educational qualifications provided for in Section 1274-5 of the General Code. Any person, practicing in Ohio who at the time of the passage of this act shall actually be engaged in this State for a period of five years continuously prior to October first, 1915, in the practice of any one or more of the limited branches of medicine or surgery hereinbefore enumerated, and who shall present to and file with the state medical board an affidavit to that effect after the passage of this act shall be exempted from the examination and shall be entitled to receive from said board a license to practice, upon the payment to said board of a fee of twenty-five dollars. The examination of all other applicants shall be conducted under rules prescribed by the board and at such times and places as the board may determine. Such examination shall be given in anatomy, physiology, chemistry, bacteriology, pathology, hygiene, diagnosis, and in such other subjects appropriate to the limited branches of medicine or surgery, certificate to practice which is applied for, as the board may require: provided, however, that applicants for certificates to practice massage or Swedish movements shall not be examined in pathology and diagnosis.

SECTION 1274-3. For the purpose of conducting such examinations the state medical board shall call to its aid any person or persons of established reputation and known ability in the particular limited branch in which the ex-

amination is being held: and in the event that here is in existence a state association or society of practitioners of any such limited branch of medicine or surgery, such association or society, except a state association or society of chiropodists, shall recommend the person or persons to be designated for this service by the board. Any person called by the state medical board to its aid, as provided in this section, shall receive for his services not more than ten dollars per day and his actual and necessary expenses to be fixed and allowed by the state medical board.

If the applicant passes such examination and has paid the fee of twenty-five dollars as required by law the state medical board shall issue its certificate to that effect. Such certificate shall authorize the holder thereof to practice such limited branch or branches of medicine or surgery as may be specified therein, but shall not permit him to practice any other branch or branches of medicine or surgery nor shall it permit him to treat infectious, contagious or venereal diseases, nor to prescribe or administer drugs, or to perform major surgery.

SECTION 1274-4. The state medical board may dispense with the examination of applicants for such limited certificates upon the same reciprocal terms and conditions with respect to such limited branches as are provided in section 1282 of the General Code with respect to physicians and surgeons generally.

SECTION 1274-5. The state medical board shall determine the standing of the schools, colleges, institutions or individuals giving instruction in such limited branches. If there shall at any time be such schools, colleges, institutions, or individuals giving instruction in such limited branches, the applicant for such certificate shall as a condition of admission to the examination, produce diploma or certificate from such school, college, institution or indi-

vidual in good standing as determined by the board, showing the completion of the required courses of instruction.

The entrance examiner of the state medical board shall determine the sufficiency of the preliminary education of applicants for such limited certificate as provided in section 1270 of the General Code; provided, however, that the state medical board may adopt rules defining and establishing for any limited branch of medicine or surgery such preliminary educational requirements, less exacting than those prescribed by said section, as the nature of the case may require.

SECTION 1274-6. The provisions of sections 1268, 1269, and 1274 to 1281, both inclusive, of the General Code, shall in all respects, in so far as the same may be applicable, govern the state medical board, all of the officers mentioned therein, and the applicants for and recipients of such limited certificates; provided, however, that in addition to the power of the board to revoke and suspend certificates provided for in section 1275 of the General Code it may also revoke or suspend the certificate of any one to whom a limited certificate has been issued upon proof of violation of the rules or regulations established by the board governing such limited practice.

SECTION 1274-7. Nothing in section 1274-1 to 1274-6, both inclusive, of the General Code, shall be so construed as in any way amending sections 1286, 1287 and 12694 of the General Code or as in any way limiting the application of said sections or any other provision of the laws of the state to practitioners of such limited branches of medicine or surgery save as hereinbefore specifically provided.

APPENDIX B.

Ohio General Code Sections.

Reference is hereby made to Chapter 20-A, Sec. 1262 *et seq.*—creating and defining the powers and duties of a State Medical Board, which is too voluminous to be included here in detail, but which by reference is made a part of this Brief. Sec. 1276, Ohio General Code in 1943, was repealed and reenacted, with extensions, in the Ohio Administrative Procedure Act.

Reference is hereby made to Sec. 154-61 to 154-73, Ohio Administrative Procedure Act, and which by reference is hereby made a part of this Brief, but which is too voluminous to here repeat in detail.

Demurrer.

Sec. 13439-9, Ohio Gen. Code:

The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this State, or when the intent is not alleged and proof thereof is necessary to make out the offense charged, or when it appears on the face of the indictment that the offense charged is not within the jurisdiction of the court. (113 v. 174, ch. 18-9. Eff. July 21, 1929.)

Motion in Arrest.

Sec. 13450-1, Ohio General Code:

A judgment may be arrested by the court upon motion of the defendant, or on the court's own motion, for either of the following causes:

1. That the offense charged is not within the jurisdiction of the court;

2. That the facts stated in the indictment or information do not constitute an offense. (113 v. 196, ch. 29-1, Eff. July 21, 1929.)

Opinion of Court of Appeals of Eighth Judicial District of Ohio, Thompson, J. (Record, 13.)

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 141.

FRANKLYN D. WEBSTER,
Petitioner,
vs.
STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

JOSEPH H. CROWLEY,
Director of Law,
JOSEPH STEARNS,
Chief Police Prosecutor,
CHARLES W. WHITE,
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Municipal Court of Cleveland,
Criminal Division,
Payne Avenue at East 21st Street,
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In the Supreme Court of the United States

OCTOBER TERM, 1952.

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FRANKLYN D. WEBSTER,

Petitioner,

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STATE OF OHIO,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW.

The opinion of the Court of Appeals of Cuyahoga County (R. 13-18) is reported in 102 N. E. (2nd) 736; in the publication of Ohio State Bar Association, "Ohio Bar," December 31, 1951, which will be 61 Ohio Law Abstract 57. The per curiam opinion of the Supreme Court of the State of Ohio is reported in 102 N. E. (2nd) 18; in the publication of the Ohio State Bar Association, "Ohio Bar," December 3, 1951, which will be 156 Ohio St. 279.

JURISDICTION.

Petitioner is invoking the jurisdiction of the Supreme Court of the United States under 28 U. S. C. Section 1257 (3).

QUESTIONS PRESENTED.

(1) Was petitioner denied procedural Due Process in the trial court?

(2) Was petitioner denied Due Process by being tried on a charge which is not a criminal offense under the statutes of Ohio?

(3) Was petitioner denied Equal Protection of the Laws because the Supreme Court of Ohio declined to review his cause on merits?

STATUTES INVOLVED.

Sections of the General Code of Ohio dealing with the limited branches of medicine and surgery, 1274-1 to 1274-7, both inclusive, are set forth in petitioner's brief, pages 21-24. Sections 12694, 1286, 1296-1 (2) of the General Code of Ohio, and Section of Federal Food and Drugs Act, Title 21, par. 321 (g), are set forth in the Appendix to this brief, pages 16 and 17.

STATEMENT OF THE CASE.

The petitioner, a so-called limited practitioner having licenses issued to him by the Ohio Medical Board for the practice of chiropractic and mechano-therapy, was charged with unauthorized practice of medicine under Section 12694, General Code of Ohio. This came about as a result of a visit to petitioner's office by a woman who was suffering from arthritis in the spine and was in good faith seeking a cure for her condition. During her visit, petitioner made use of a diagnostic machine, also called "radioclast," in an attempt to diagnose her condition. Becoming suspicious of his methods, the woman contacted the local office of the Better Business Bureau, with the result that,

on her second visit to petitioner's office she was accompanied by a Mr. Cole of said office. In the presence of Mr. Cole, whom she introduced as her husband, petitioner went through the entire procedure as on her first visit, whereupon he prepared and handed her several bottles of pills and wrote out instructions as to when and how many of the prescribed pills she was to take. To one of these bottles a printed label was fastened reading, "To be dispensed only by or on prescription of a physician." A chemist employed by the Food and Drug Division of the City of Cleveland identified the contents of the bottles and described the ingredients of pills in technical language. Testifying in his own defense petitioner admitted the facts brought out by the prosecutor, but insisted that the prescribed pills were not drugs; he said they were "food supplements" intended to supply "food deficiencies" in the body of the woman patient. A jury found the petitioner guilty and the trial judge sentenced him to pay a fine of $500.00 and costs.

In due course application for a new trial was made and denied. The case was reviewed by the Court of Appeals of Cuyahoga County, which court affirmed the judgment of the trial court in a written opinion (R. 13). The Supreme Court of Ohio denied petitioner's appeal as of right and also overruled his motion for review asked on the ground that the case involved a question of public and great general interest.

In State courts petitioner argued that the affidavit in the case at bar did not state an offense, and that the affidavit failed to inform him of the nature and cause of the accusation against him as provided in Ohio Constitution. Now he also claims that the State Supreme Court, by its refusal to review his case on merits, deprived him of equal protection of the laws under the Fourteenth Amendment.

ARGUMENT.

Summary.

Petitioner's trial was a fair and impartial examination of facts in accordance with the laws of Ohio during which nothing happened that could be construed as being even remotely offensive to his rights under the Due Process Clause. He was given the opportunity to have his cause reviewed on questions of law in an appellate court and took full advantage of that opportunity. The mere fact that the Supreme Court of Ohio, after reading his brief and hearing his oral argument that his rights under both the State and Federal Constitution were invaded during the trial of his cause, declined to hear him on the merits of the cause, did not deprive petitioner of the equal protection of the laws, the action of the court being consonant with established State policy. The offense involved in the case at bar is concerned with the public health and comes, as such, within traditional bounds of the police power of a State. The statutes of Ohio which were applied in this case state an offense in clear, precise language. Petitioner's implied claim that he misunderstood their import is absurd on its face in view of the fact that these statutes expressly apply to persons engaged in the practice of "limited medicine." When he ignored the clear command of the Legislature and crossed the line it drew for his benefit, he was acting at his peril and has no just complaint. No better founded is petitioner's further claim that he was denied equal protection of the laws because the State chose to prosecute him criminally for practice beyond the scope of his two certificates for the limited practice of medicine without first proceeding against him administratively and taking from him the rights conferred

by said certificates. The constitutional power of State to protect the public health not being denied, the choice of means and methods for the accomplishment of the desired end becomes clearly a matter of policy as to which Ohio was fully competent to make its own determination.

I. Petitioner's complaint that he was denied procedural Due Process of Law under the Fourteenth Amendment has no foundation whatever.

Procedural due process under the Fourteenth Amendment as applied to the States means observance of standards of fairness and justice that are so rooted in the traditions of the American people as to be ranked fundamental. *Locher v. New York*, 198 U. S. 45, 74; *Snyder v. Massachusetts*, 291 U. S. 97; *Palko v. Connecticut*, 302 U. S. 319. The affidavit in which petitioner was charged (R. 32) clearly and fully informed him of the nature and cause of the accusation against him as provided in Section 10, Article I of the Ohio Constitution. Therefore, his demurrer to the charge was overruled. Denied likewise was his demand for a bill of particulars, as there was no basis for the demand under State or Federal law. *Stoughton v. State*, 2 Ohio St. 562, 563; *State v. Burke*, 104 Ohio St. 220, 223; *Cleveland v. Gogola*, 41 Ohio Law Abstract 452; *Carter v. Illinois*, 329 U. S. 173; *Commonwealth v. Bartolini*, 13 N. E. (2nd) 382; 299 Mass. 503, certiorari denied 304 U. S. 565. The trial, which was to a jury, was conducted in the same manner as are thousands of other trials in the courts of Ohio where a defendant is charged with a misdemeanor.

II. Interpretation of State statutes by Ohio courts in regard to criminal prosecution of limited practitioners for practice beyond the scope of their certificates is correct and not violative of Due Process Clause.

The Court of Appeals of Cuyahoga County, in its opinion (R. 18) affirming the conviction of petitioner for unauthorized practice of medicine, declared as follows:

> "The third claim of error appears more substantial, that Section 12694, G. C., does not apply to a chiropractic or mechano-therapist, holding a limited certificate under Sec. 1274-3 G. C., and that either the sole method or at least the first method required in proceeding against such individual improperly practicing medicine is that outlined in Sec. 1274-6, G. C., authorizing the State Medical Board to revoke or suspend a limited certificate 'upon proof of violation of the rules and regulations established by the Board governing such practice.' Unfortunate for this contention, however, is the provision of the next following section of the General Code, Section 1274-7, which expressly declares that 'nothing in Sections 1274-1 to 1274-6, both inclusive, of the General Code of Ohio, shall be construed as in any way amending Sections 1286, 1287 and 12694 G. C., or as in any way limiting the application of said sections or any other provisions of the laws of the state to practitioners of such limited branches of medicine or surgery save as hereinbefore provided.' In other words, the very sections of the General Code providing for the licensing of individuals engaged in the limited branch of chiropractic and mechano-therapy expressly recognize the applicability to this group of limited practitioners of other sections of the Code prohibiting general practice of medicine by those who have failed to procure a license so to do."

The question under discussion was decided by the Supreme Court of Ohio in *State v. Winterich,* also in-

volving a limited practitioner charged with unauthorized practice of medicine (advance sheets of 105 N. E. Reports (2nd), June 11, 1952; publication of Ohio State Bar Association, May 5, 1952, which will be 157 Ohio St. 412). The *Winterich* case traveled the same route as the case at bar from Municipal Court of Cleveland to the Court of Appeals of Cuyahoga County to the State Supreme Court, where the courts below were reversed for prejudicial error in trial court's charge to the jury in regard to the word "drug" as defined in Section 1296-1 (2), General Code of Ohio, and judgment was rendered for the defendant. It may be noted that in the *Winterich* case, the sufficiency of the affidavit was questioned on the same grounds as here, the State Supreme Court, however, dismissed defendant's appeal as of right, but allowed the motion for review on finding that a question of public interest was involved. In the first paragraph of the syllabus of that case, it was held:

> "The provisions of Section 12694, General Code, that 'whoever practices medicine or surgery, or any of its branches before obtaining a certificate from the State Medical Board in the manner required by law * * * shall for the first offense be fined,' applies to one who has a certificate for the practice of a limited branch of medicine or surgery and who practices medicine or surgery beyond the scope permitted by such limited certificate."

In the body of the opinion, the State Supreme Court said:

> "Section 12694, General Code, must be read in connection with Section 1274-1, which authorizes the State Medical Board to 'examine and register persons desiring to practice any limited branch or branches of medicine and surgery' and which defines such branches to 'include chiropractic * * * mechanotherapy * * * electro-therapy,' and also must be read

> in connection with Section 1274-3, which provides that 'such certificate shall authorize the holder thereof to practice such limited branch or branches of medicine or surgery as may be specified therein, but shall not permit him to practice any other branch or branches of medicine or surgery nor shall it permit him to treat infections, contagious or venereal diseases, not to prescribe or administer drugs, or to permit major surgery.' "

The basic definition as to what constitutes practice of medicine is practically uniform in the forty-eight states. Prescribing for a disease, pain, injury, deformity or physical condition of a human being is one of the essential constituent elements. *Callahan and Callahan, The Law of Medicine* (Oceania Publications, New York, 1950), page 8. Remembering that the petitioner never applied for a certificate for the general practice of medicine, no doubt because he did not have the necessary training, the law laid down in *Collins v. Texas*, 223 U. S. 288, appears to give full support to the position taken by the Ohio courts in this matter. In that case, it was held, in the third paragraph of the syllabus:

> "The Texas statute of 1907, establishing a Board of Medical Examiners, and conditions under which persons will be licensed to practice osteopathy, does not deprive one who refuses to apply for a license thereunder of his property without due process of law, or deny him the equal protection of the law."

On page 296, the Court, speaking through Mr. Justice Holmes, said as follows:

> "We are far from agreeing with the plaintiff in error that the definition of practicing medicine in § 13 is arbitrary or irrational, but it would be immaterial if it were, as its only object is to explain who

> fall within the purview of the act. That it does, and of course we follow the Texas court in its decision that the plaintiff in error is included. It is true that he does not administer drugs, but he practices what purports to be a healing art. The State constitutionally may prescribe conditions to such practice considered by it to be necessary or useful to secure competence to those who follow it. * * * In short, the statute says that if you want to do what it calls practicing medicine you must have gone to a reputable school in that kind of practice."

To the same effect is *Reetz v. Michigan*, 188 U. S. 505, where it was held:

> "A state has power to make reasonable regulations for determining the qualifications of those engaged in the practice of medicine and for punishing those who attempt to engage therein in defiance of such statutory provision."

Of some interest here is *Williams v. Scudder*, 31 Ohio Decisions (1920) 169, where the Ohio act for the regulation of limited practitioners, Sections 1274-1 to 1274-7 of the General Code of Ohio, was being attacked as unconstitutional. The Court of Common Pleas enjoined the State Medical Board from carrying out the provisions of the law, saying among other things, that making violations of the rules and regulations of the Board under the act a penal offense was an unconstitutional delegation of legislative power. However, this decision was reversed by the Court of Appeals of Cuyahoga County and the Supreme Court of Ohio. *Williams v. Scudder*, 102 Ohio St. 305. This Court denied certiorari. *Williams v. Scudder*, 258 U. S. 607.

It may be mentioned in this connection that chiropractors, probably the best known among the limited prac-

titioners of medicine, in most States cannot obtain a license for the independent practice of their occupation. *Callahan and Callahan, The Law of Medicine, supra,* page 10. Ohio, on the other hand manifests a tolerant spirit toward practitioners of limited branches of medicine and allows them independent practice, provided they are able to qualify as provided by law. However, no State, to our knowledge permits a limited practitioner to transgress the limits of his certificate without subjecting him to criminal prosecution. *Arnold v. Schmidt* (Wisconsin), 143 N. W. 1055; *State v. Jones* (Missouri), 164 S. W. (2nd) 85; *Nethken v. State* (Arizona), 104 P. (2nd) 159; *Heintzke v. N. J. State Board* (New Jersey) 153 A. 253; *People v. Frankowsky* (Illinois), 21 N. E. (2nd) 502; *State v. Baker* (North Carolina), 48 S. E. (2nd) 61; *Com. v. Daily,* 75 Pa. Superior Court 510; *State v. Houck* (Washington), 203 P. (2nd) 693; *People v. Fowler* (California), 84 P. (2nd) 326; *People v. Mari* (New York), 183 N. E. 853.

Significantly enough, a limited practitioner cannot use a State certificate as a ladder to greater authority than was given him in such certificate when he comes into collision with a Federal law. *Georgia Association of Osteopathic Physicians v. Allen, Collector of Internal Revenue,* 31 F. Supp. 206, affirmed 112 F. (2nd) 52; *Perry v. Larson,* 25 F. 728; *United States v. 22 Devices, More or Less,* 98 F. Supp. 914.

We are fully aware that a statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application does not satisfy Due Process Clause of the Fourteenth Amendment. *Connolly v. General Construction Company,* 289 U. S. 385, 391. But manifestly, this is not the situation here. Can the petitioner con-

vincingly plead that he did not understand the prohibition, expressly applicable to him as a limited practitioner, that he is not permitted to prescribe drugs without incurring the sanction of the criminal law? Can he make such a plea in face of Section 1274-7, General Code of Ohio, which makes Section 12694, G. C., the penalty section for practicing medicine without a license, expressly applicable to all limited practitioners without exception? Bearing in mind that a limited practitioner is prohibited to prescribe drugs in Section 1274-3, G. C., and that the prohibition is repeated in "Rules and Regulations Governing Limited Practitioners," promulgated by the State Medical Board under authority of Section 1274-1, G. C., it is important to note that on page 4 of said Rules and Regulations, which were received in evidence at the trial (R. 39), the following explanatory statement is found:

> "Failure to comply with the rules and regulations established, governing the practice of the branch specified in the certificate will not only warrant prosecution for illegal practice of medicine and surgery, but subject the offender to prosecution for revocation of license."

Petitioner, as a limited practitioner, was surely charged with notice of the foregoing statement of the State Medical Board, aside from the fact that, in criminal actions, ignorance of the law is never an excuse. The situation here is substantially analogous with the one found in *Horning v. District of Columbia*, 254 U. S. 135, where the Court, speaking of defendant, said:

> "It may be assumed that he intended not to break the law but to get as near to the line as he could, which he had a right to do but if the conduct described crossed the line, the fact that he desired to keep within it will not help him. It means only that he misconceived the law."

To the same effect is *Ellis v. United States,* 206 U. S. 246. And in the recent case of *Boyce v. Motor Lines, Inc. v. United States,* 342 U. S. 337, it was held:

> "No more than a reasonable degree of certainty can be demanded in the language of the prohibition contained in a criminal statute, and it is not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

Another aspect of the argument advanced by the petitioner that he was not amenable to a criminal prosecution is his contention that such prosecution was offensive to Due Process because it was undertaken before the State Medical Board either suspended or revoked his certificates for the limited practice of medicine. This is a strange argument indeed. Would he not contend, if the State were to follow his suggestion, that the law, as to him, is being applied *ex post facto?* A constitutionally more complex situation was resolved in *Tigner v. Texas,* 310 U. S. 141, where the anti-trust law of the state of Texas was under attack on similar grounds, and the court declared, on page 148:

> "How to effectuate policy—the adoption of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislative range of choice."

III. Refusal of Ohio Supreme Court to hear petitioner's appeal on a claimed constitutional question did not deprive petitioner of equal protection of the laws.

Petitioner contends that he was deprived of equal protection of the laws under the Fourteenth Amendment because the Supreme Court of Ohio, having examined his brief and listened to his oral argument in support of his appeal as of right, decided that no debatable constitutional question was involved in the case and therefore declined to review it on merits. Does the petitioner by this contention suggest that the provisions of Ohio Constitution which set forth the jurisdiction of the State Supreme Court are repugnant to the particular clause of the Federal Constitution? Section 2 of Article IV of the Ohio Constitution, so far as material here, provides as follows:

> "The supreme court shall * * * have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeal, and such revisory jurisdiction in the proceedings of administrative officers as may be conferred by law. * * * No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court."

In 2 *Ohio Jurisprudence,* Appellate Review, Section 502, page 896, it is stated:

> "An appeal on questions of law, formerly error, brought to the Supreme Court as a matter of right on the claim that a constitutional question is involved, will be dismissed if that court finds that no such question, or none which is debatable, is actually involved,

> or if the record discloses that the case can be disposed of without entering the consideration of any constitutional question, or that the constitutional question claimed to be involved in the case was not submitted to nor decided by the Court of Appeals."

In *Ohio v. Akron Metropolitan Park District,* 281 U. S. 74, another provision of Ohio Constitution dealing with the jurisdiction of the Supreme Court of the State was under attack, and it was held in the syllabus:

> "The right of appeal is not essential to due process provided that due process has already been accorded in the tribunal of first instance.
>
> "Section 2 of Article IV of the Ohio Constitution providing that 'no law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals,' *held,* not violative of due process or equal protection clause of the Fourteenth Amendment."

In that case the Court, speaking through Chief Justice Hughes, declared on page 80:

> "The opportunity afforded to litigants in Ohio to contest all constitutional questions fully in the Common Pleas Court and again in the Court of Appeals plainly satisfied the requirement of the Federal Constitution in this respect and the State was free to establish the limitation in question in relation of appeals to its Supreme Court in accordance with its views of state policy."

The question under discussion is restated in broad terms in *Carter v. Illinois,* 329 U. S. 173.

CONCLUSION.

It is plain that no Federal question is involved in this case. Accordingly, petitioner's request for a certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

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VATRO J. GRILL,
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APPENDIX.

Sections of the General Code of Ohio.

SECTION 12694. *Practice of medicine or surgery without certificate, unlawful; penalty.*—Whoever practices medicine or surgery, or any of its branches before obtaining a certificate from the state medical board in the manner required by law, or whoever advertises or announces himself as a practitioner of medicine or surgery, or any of its branches, before obtaining a certificate from the state medical board in the manner required by law; or whoever opens or conducts an office or other place for such practice before obtaining a certificate from the state medical board in the manner required by law; or whoever not being a licensee conducts an office in the name of some person who has a certificate to practice medicine or surgery, or any of its branches; or whoever practices medicine or surgery, or any of its branches, after a certificate has been duly revoked or, if suspended, during the time of such suspension, shall, for the first offense be fined * * *.

SECTION 1286. *What constitutes practice of medicine, surgery or midwifery.*—A person shall be regarded as practicing medicine, surgery or midwifery, within the meaning of this chapter who uses the words or letters, "Dr.," "Doctor," "Professor," "M.D.," "M.B.," or any other title in connection with his name which in any way represents him as engaged in the practice of medicine, surgery or midwifery, in any of its branches, or who examines or diagnoses for a fee or compensation of any kind, or prescribes, advises, recommends, administers or dispenses for a fee or compensation of any kind, direct or indirect, a drug or medicine, appliance, application, operation or treatment of whatever nature for the cure or relief of a wound, fracture or bodily injury, infirmity or disease. The use of any such words, letters or titles in such connection or under

such circumstances as to induce the belief that the person who uses them is engaged in the practice of medicine, surgery, or midwifery, shall be prima facie evidence of the intent of such person to represent himself as engaged in the practice of medicine, surgery or midwifery.

SECTION 1296-1.—*Definitions.* * * *

(2) The term "drug" or "pharmaceutical preparation" means (a) articles recognized in the official United States Pharmacopoeia, or official National Formulary, or any supplement to either of them, intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals; and (b) all other articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals, and (c) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (d) articles intended for use as a component of any articles specified in clause (a), (b), or (c); but does not include devices or their components, parts or accessories.

United States Code.

TITLE 21, par. 321.—*Definitions.* * * *

(g) The term "drug" means (1) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or components, parts, or accessories. (June 25, 1938, c. 675, para. 201, 52 Stat. 1041.)